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Tsavaris v. Scruggs, 360 So. 2d 745 (Fla. 1977)

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Constitutional Law—SELF-INCRIMINATION—FLORIDA SUPREME COURT SIGNALS POSSIBLE RETREAT IN PROTECTION AGAINST COMPULSORY PRODUCTION OF INCRIMINATING DOCUMENTARY EVIDENCE—*Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977).

On April 19, 1975, psychiatrist Louis Tsavaris called ambulances to the residence of Cassandra Ann Burton. The ambulance personnel arrived to find Dr. Tsavaris in the apartment with Miss Burton's dead body. At the scene, Dr. Tsavaris explained that Miss Burton was his patient and that he thought she had taken a drug overdose. During the subsequent investigation, however, one of Miss Burton's friends told authorities that Miss Burton and Dr. Tsavaris had been romantically involved and that Miss Burton had recently become pregnant. The friend also reported that the couple's relationship was "stormy" and that although Miss Burton had wanted the child, she had undergone an abortion at Dr. Tsavaris' insistence.

During the autopsy, Dr. Tsavaris called the morgue several times to inquire about the cause of Miss Burton's death. He was informed that although the autopsy was incomplete, the pathologist had determined that Miss Burton had recently had an abortion. During one of these conversations, Dr. Tsavaris denied knowing of the abortion. The medical examiners eventually determined that Miss Burton had been strangled.

Later, investigators went to Dr. Tsavaris' office and asked his secretary to identify the patients who had attended a group therapy session on the night of Miss Burton's death. The secretary refused to answer, explaining that she was not permitted to divulge the names for ethical reasons. The assistant state attorney then issued two subpoenas duces tecum to secure records from Dr. Tsavaris' office.[1] Complying with the subpoenas, the secretary produced Dr. Tsavaris' personal appointment book for April, 1975, and all medical records relating to Miss Burton.[2]

Dr. Tsavaris' personal appointment book contained handwritten notations of patients' names and appointment times and indicated the scheduling of group sessions. It was not established whether the handwriting in the book was Dr. Tsavaris'.[3] Miss Burton's medical file contained several items, some typed and some handwritten. The

1. The subpoenas were addressed to "Custodian of Records, . . . (Office of Dr. Louis Tsavaris)." Considering herself the "Custodian of Records," and apparently not realizing that it might be inappropriate for her to release documents belonging to Dr. Tsavaris, his secretary complied with the subpoenas. Tsavaris v. Scruggs, 360 So. 2d 745, 748 (Fla. 1977), *denial of rehearing noted*, 360 So. 2d 745 (Fla. 1978).

2. 360 So. 2d at 748.

3. *Id.*

author of some of the items was not identified on the records.[4]

The state prosecutor subpoenaed Dr. Tsavaris to appear before a grand jury investigating Miss Burton's death. When asked if he would answer any questions relating to her death, Dr. Tsavaris answered that he would not, invoking the privilege against self-incrimination. Thereafter, the Hillsborough County grand jury indicted Dr. Tsavaris for first degree murder.[5]

Dr. Tsavaris moved to dismiss the indictment on the ground that he had been immunized from prosecution when his secretary complied with the subpoenas duces tecum.[6] Upon the trial court's denial of his motion to dismiss, Dr. Tsavaris petitioned the Florida Supreme Court for a writ of prohibition. The supreme court held that Dr. Tsavaris was not entitled to immunity and discharged the rule nisi in prohibition.[7] Dr. Tsavaris petitioned for a rehearing and after lengthy consideration, the supreme court denied his request.[8]

Because the proceeding was for a writ of prohibition, the court's holding officially reached only the issue of the applicability of the immunity statute. The court reasoned that Dr. Tsavaris' contention that he was immunized by his secretary's compliance with the subpoenas duces tecum was not compatible with either the purpose of the immunity statute or its plain meaning. The supreme court em-

4. Miss Burton's medical file contained the following items: a typewritten report prepared by a clinical psychologist, a business letter from that psychologist to Dr. Tsavaris, a typewritten report describing Miss Burton's physical and mental condition following an automobile collision in January of 1975, a prescription for Dilantin for Sally Burton written on Dr. Tsavaris' stationery, several Connecticut General Life Insurance Co. forms with Miss Burton's signature on them, a form entitled "Attending Physician's Statement" with Dr. Tsavaris' name typed on the signature line, a typed statement for services rendered, and a handwritten sheet containing Miss Burton's name, address, telephone number, age, and date of birth. *Id.* at 748-49.

5. *Id.* at 747.

6. *Id.* Dr. Tsavaris claimed immunity under the provisions of FLA. STAT. § 914.04 (1977). This section provides:

> No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or State Attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

7. 360 So. 2d at 752. Justice Hatchett authored the opinion. Justice Sundberg concurred specially, and Justices England and Adkins dissented in opinions joined by Justice Roberts.

8. The supreme court denied immunity and discharged the rule nisi in prohibition on March 17, 1977. It was not until July 10, 1978, that the court denied the motion for rehearing. *Id.* at 758.

phasized that the legislature enacted the immunity statute to assist the state in criminal prosecutions.[9] Characterizing the immunity statute as a device "for securing witnesses' self-incriminating testimony in the prosecution of third parties,"[10] the court concluded that because the statute envisioned a conscious decision by the prosecutor to grant immunity in exchange for a witness' testimony, the secretary's compliance with the subpoenas could not have inadvertently immunized Dr. Tsavaris.[11] The court also demonstrated that the plain language of the immunity statute refuted Dr. Tsavaris' contention.[12] Thus under neither the purpose nor plain meaning of the statute could the secretary's production of documentary evidence have conferred statutory immunity on Dr. Tsavaris.

This comment will concentrate on an unanswered question of the *Tsavaris* case—did the compelled production of documentary evidence force Dr. Tsavaris to be a witness against himself? Because a ruling on the writ of prohibition required resolution of the immunity issue only, the court did not discuss the self-incrimination question in any depth. Indeed, the court emphasized that it had not decided whether the subpoenaed evidence should be suppressed at Dr. Tsavaris' trial.[13] The court, however, by referring to recent United States Supreme Court cases dealing with documentary evidence and the fifth amendment,[14] signaled a possible shift in the Florida Supreme Court's view of the privilege against self-incrimination. The design of this comment then is threefold. First, it will examine the court's reasoning in *Tsavaris,* focusing on the issue of compulsory self-incrimination. Second, it will explore the traditional interpretation of the privilege against self-incrimination in Florida. And last, it will recommend the position that the Florida

9. *Id.* at 749. In support of its position, the *Tsavaris* court cited State v. Schell, 222 So. 2d 757, 758 (Fla. 2d Dist. Ct. App. 1969). The *Schell* court stated that "the state may elect to immunize one offender from prosecution in order to secure the conviction of another, and this statute should be liberally construed to accomplish that purpose." *Id.* at 758.

10. 360 So. 2d at 749.

11. *Id.* at 751. As to the secondary issue that immunity might have been conferred when Dr. Tsavaris was subpoenaed to appear before the grand jury, the court said, "[w]hen Dr. Tsavaris invoked the Fifth Amendment, the authorities stopped questioning him rather than requiring him to answer. The prosecution elected not to confer immunity and refrained from further questions on that account." *Id.* at 749-51. Justice Adkins argued in dissent that immunity should attach because by compelling Dr. Tsavaris to appear before the grand jury and invoke his privilege against self-incrimination, the state had unduly prejudiced the grand jury against him. *Id.* at 757.

12. The court quoted FLA. STAT. § 914.04 which states that "no person shall be prosecuted . . . for . . . any . . . matter . . . concerning which *he* may . . . produce evidence." 360 So. 2d at 751 (emphasis in original).

13. *Id.* at 752.

14. Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976).

Supreme Court should take on the question of self-incrimination through production of documents in response to the increasingly narrow interpretations of the United States Supreme Court.

Dr. Tsavaris based his immunity claim on *State ex rel. Byer v. Willard*[15] and *State v. Dawson.*[16] Essentially, these cases held that where defendants have been compelled to produce incriminating documentary evidence, they were entitled to immunity. In *Tsavaris,* the supreme court declined to follow its own precedent and rejected the theory underlying the *Willard* case.[17] In *Willard,* the circuit court issued a search warrant empowering an investigator to enter the private offices of several men suspected of gambling and to seize their personal documents and books. A grand jury used the evidence seized to indict the defendants. The defendants moved to quash the indictment on the ground that the seizure and use of their personal papers had compelled them to be witnesses against themselves. Although the trial court refused to dismiss the charges, the supreme court reversed and held that the defendants had been compelled to incriminate themselves and that they were therefore entitled to immunity under section 932.29, Florida Statutes.[18] The *Willard* court reasoned that the seizure of personal records by warrant was indistinguishable from compelling production of such items.[19]

While declining to follow *Willard,* the *Tsavaris* court did not indicate that its rejection was due to what it regarded as a misapplication of the immunity statute. Rather, the *Tsavaris* court refused to find *Willard* controlling because of its theory that seizure of a man's documents for use against him was equivalent to compelling a man to be a witness against himself.[20] To the degree that *Willard* rested on federal constitutional grounds, the *Tsavaris* court noted that *Andresen v. Maryland*[21] would mandate a different result today.[22]

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15. 54 So. 2d 179 (Fla. 1951).

16. 290 So. 2d 79 (Fla. 1st Dist. Ct. App. 1974).

17. 360 So. 2d at 751.

18. 54 So. 2d at 182. The statute cited in *Willard* was a predecessor to the present immunity statute under which Dr. Tsavaris claimed immunity.

19. The Florida Supreme Court in *Willard* stated:

> Whether a person be compelled to supply evidence against himself by word of mouth or by bringing in documents or records tending to incriminate him, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers, the result is the same to one accused of crime. In either case such person is compelled to be an unwilling witness against himself in a criminal proceeding . . . .

Id.

20. 360 So. 2d at 751.

21. 427 U.S. 463 (1976). In *Andresen,* authorities used a warrant to seize incriminating records from an attorney's private office. Although the attorney argued that the state's use of these records violated his privilege against self-incrimination, the United States Supreme Court rejected his claim.

The court concluded that since the subpoenaed items had been voluntarily created and Dr. Tsavaris had not been forced to produce the documents himself, he had not been compelled to incriminate himself, and there was no federal constitutional bar to prosecution.[23] To explain this conclusion, the *Tsavaris* court quoted from Justice Blackmun's language in *Andresen:* "[Andresen] was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel."[24] The *Tsavaris* court continued, pointing out that while persons are protected against producing incriminating evidence, they are not protected against its production by others.[25] Furthermore, the privilege against self-incrimination adheres not to the evidence or information to be used against a person, but to the person.[26] Finally, the *Tsavaris* court stated that:

> although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, . . . a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.[27]

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22. 360 So. 2d at 751. It is interesting to note that the *Tsavaris* court seemed to assume that *Willard* rested primarily on federal constitutional grounds. However, in *Willard,* the Florida Supreme Court, after reciting the facts, stated the issue of the case to be "whether the use of the evidence obtained by means of the search warrant amounted, in legal effect, to compelling the relators to give evidence against themselves, within the meaning, and in violation, of Section 12 [now section 9], Declaration of Rights, Florida Constitution . . . ." 54 So. 2d at 180-81.

23. 360 So. 2d at 752.

24. *Id.* (quoting Andresen v. Maryland, 427 U.S. at 473).

25. 360 So. 2d at 752 (quoting 427 U.S. at 473). Justice Blackmun in *Andresen* refers to Justice Holmes' famous opinion in Johnson v. United States, 228 U.S. 457, 458 (1913).

26. 360 So. 2d at 752.

27. *Id.* (quoting 427 U.S.. at 473-74) (citations omitted).

As evidenced by the excerpt from *Andresen,* the key to the present United State Supreme Court's reading of the privilege against self-incrimination is a very literal and narrow interpretation of the concept of compulsion. The earlier cases such as Boyd v. United States, 116 U.S. 616 (1886), had recognized that a man could be compelled to be a witness against himself if his private papers were seized and utilized in his prosecution. After *Andresen,* however, only two types of compulsion relating to documentary evidence are protected by the fifth amendment—actual compulsion to create an incriminating document, or compulsion by the issuance of a subpoena which forces the defendant himself to produce and authenticate an incriminating document.

A recent Fifth Circuit case illustrates the position being taken by federal courts since the *Andresen* case.

> [T]he Supreme Court has made it clear that the fifth amendment protection of

In addition to its rejection of *Willard*, the court's holding in *Tsavaris* severely limited *State v. Dawson*,[28] which was factually almost identical to *Tsavaris*. In *Dawson*, the state issued subpoenas duces tecum to an attorney's employees, compelling them to produce the attorney's office records. A grand jury indicted Dawson for grand larceny based on some of the documentary evidence his employees had produced. Dawson moved for dismissal of all charges on the ground that, through his employees, he had been compelled to produce incriminating evidence and therefore should be immunized under section 914.04, Florida Statutes.[29] Affirming the trial judge's decision that Dawson had been immunized, the appellate court cited *Boyd v. United States*,[30] and stated, "[w]e think there is no difference whatever in compelling a man to be a witness against himself and in seizing his records to be used against him."[31]

Interestingly, the *Tsavaris* court did not criticize the *Dawson* decision for incorrectly applying the immunity statute, which would have sufficed to harmonize *Dawson* with its decision. The supreme court instead rejected *Dawson* for its reliance on the *Boyd* rationale concerning compulsory production of documents—a theory which the court noted had recently been seriously limited. The court stated that recent United States Supreme Court decisions indicate

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> "personal security, personal liberty, and private property," *Boyd v. United States*, does not amount to a general privilege for private papers. Rather, those cases establish that the privilege can be invoked only when the actual preparation of the documents or the making of the written declarations which they contain, has been compelled. When a document has been created voluntarily . . . the fifth amendment does not bar its use in a prosecution . . . . [citations omitted].

Fagan v. United States, 545 F. 2d 1005, 1007 (5th Cir. 1977). Thus it appears that regardless of the private or personal nature of a document, or the reasonableness of an author's expectations of privacy in a document, such document, if voluntarily created can be seized or subpoenaed and the contents thereof used to incriminate the author.

For an excellent discussion of the new rationale regarding compulsory self-incrimination, see Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977).

28. 290 So. 2d 79 (Fla. 1st Dist. Ct. App. 1974).

29. *Id.* at 81.

30. 116 U.S. 616 (1886). In exchange for supplying the government with 29 cases of foreign glass from their duty-paid inventory, the E.A. Boyd and Sons partnership was to be allowed to replenish their supply by duty-free glass. The partnership imported 35 cases of duty-free glass but thereafter attempted to import additional duty-free goods. After confiscating the additional shipment, the government issued a subpoena duces tecum to compel production of the incriminating invoice for the original 29 cases. The trial court rejected the partnership's fifth amendment claim and declared the goods forfeited. Reversing the judgment, the Supreme Court held that compelling production of the invoice had violated the petitioners' privilege against self-incrimination. Justice Bradley summed up the Court's attitude by saying that he was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

31. 290 So. 2d at 82-83.

that there are crucial distinctions between compelling testimony and compelling the production of documentary evidence in the possession of third persons.[32] These cases "have seriously undercut the precedential force of *Boyd v. United States.*"[33]

Considering the purpose of the immunity statute, the decision to refuse immunity seems appropriate. Cause for concern, however, arises from the manner in which the court unnecessarily undermined the strength of those earlier cases which had articulated Florida's position on self-incrimination by compelled production of documentary evidence. Returning to the *Dawson* case, the *Tsavaris* court questioned that decision for its adherence to the *Boyd* concept concerning incriminating use of personal papers. This treatment, however, ignored a significant aspect of *Dawson's* self-incrimination theory. The *Dawson* court held that because the documents were relevant to the confidential attorney-client relationship, and thus personal to the attorney, compelled production through the employees was equivalent to forcing the attorney to produce the papers himself.[34] This concept, independent of the now federally discredited *Boyd* rationale, should not be discarded in considering whether Dr. Tsavaris was compelled to be a witness against himself.

The *Tsavaris* court's treatment of the *Willard* case also raises serious questions about the court's interpretation of the privilege

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32. 360 So. 2d at 751.

33. *Id.* at n.8. The *Tsavaris* court specifically referred to language from Fisher v. United States, 425 U.S. 391 (1976). "Several of *Boyd's* express or implicit declarations have not stood the test of time." *Id.* at 407. "It would appear that . . . the precise claim sustained in *Boyd* would now be rejected . . . ." *Id.* at 408.

34. 290 So. 2d at 82-83. Justice England referred to this important aspect of *Dawson* in his dissent in *Tsavaris* stating:

> Until today it was well settled that Article I, Section 9 of the Florida Constitution extends to documents and records belonging to the accused, as well as to oral testimony. *State ex rel. Byer v. Willard,* 54 So. 2d 179 (Fla. 1951). Moreover, it has been immaterial to the question of immunity that the documents at issue were obtained from a professional's employees so long as they were relevant to a confidential and professional (in this case doctor-patient) relationship. *State v. Dawson,* 290 So. 2d 79 (Fla. 1st DCA 974). I would not scrap these constitutional safeguards
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> . . . .

360 So. 2d at 754 (footnote omitted).

In *Tsavaris,* the relationship was that of psychiatrist-patient. The privilege of confidentiality between psychiatrist and patient is established by statute in Florida. FLA. STAT. § 90.242 (1977). There is no doubt that the subpoenaed records were relevant to a confidential and professional relationship and thus were personal as those in *Dawson.* The state should not be permitted to obtain private documents by simply addressing a subpoena to someone who has access to but is neither the author, owner, or official custodian of such documents. Although the total immunity advocated by the dissenting justices may not be appropriate, the author of private documents should certainly have some remedy when, as in *Tsavaris,* his secretary unwittingly subjects him to possible incrimination by complying with a subpoena.

against self-incrimination. Although the *Willard* court followed the *Boyd* rationale, the opinion clearly demonstrated that the ruling was consonant with Florida's privilege against self-incrimination and not merely a capitulation to federal standards. The *Willard* court said,

> It has long been settled that the provision in our Declaration of Rights that "no person shall be . . . compelled in any criminal case to be a witness against himself" must be broadly and liberally construed in order to secure the protection designed to be accomplished by it; and that to this end no technical limitations should be placed upon the terms employed.[35]

Thus, the court's decision in *Tsavaris* to reject the underlying rationale of *Willard* sounds a threatening note to the idea that Florida's privilege against self-incrimination extends to personal records as well as oral testimony.

There are several areas of the law which define the scope of the privilege against self-incrimination in Florida. The Declaration of Rights of the Florida Constitution provides that, "[n]o person shall be . . . compelled in any criminal matter to be a witness against himself."[36] Since after *Andresen,* the federal constitution would not require suppression of Dr. Tsavaris' personal records, the question remains whether Florida's privilege against self-incrimination prevents admission of such evidence at a subsequent trial.[37] It is cer-

35. 54 So. 2d at 181.

36. FLA. CONST. art. I, § 9. The predecessor to this provision was FLA. CONST. art. I, § 12 (1885), which provided that "[n]o person shall be . . . compelled in any criminal *case* to be a witness against himself . . . ." (Emphasis added.) It has been noted that this change of language might have signaled a broadening of Florida's protection against self-incrimination relative to the federal privilege which only refers to criminal *cases. See* D'Alemberte, *Commentary,* in 25A FLA. STAT. ANN. 111-12 (West 1970).

37. Since the denial of the writ of prohibition and the denial of the petition for rehearing, Dr. Tsavaris has obtained new counsel. Subsequently, another writ of prohibition was filed, arguing that Dr. Tsavaris may not be tried because his speedy trial rights have been violated. With this matter pending, no trial date has been set. There has not yet been an opportunity for Dr. Tsavaris to assert his possible exclusionary remedy. Due to the questionable admissibility of the subpoenaed evidence, and depending on the strength of other evidence, the state may simply choose not to use the subpoenaed materials. Telephone conversation with Norman S. Cannella, Chief Assistant State Attorney, Tampa, Florida (January 12, 1979).

The second writ of prohibition in the *Tsavaris* case, that dealing with speedy trial, was filed with the Florida Supreme Court on October 6, 1978. On February 6, 1979, reporters from the St. Petersburg Times contacted Chief Justice Arthur England to find out the status of the *Tsavaris* case. Chief Justice England stated that he was not aware that the case had been returned to the high court, that it was not proper for a case to be in the appellate courts so long, and that he would check on the matter. St. Petersburg Times, Feb. 7, 1979, § B, at 1, col. 1. At this writing, the writ is still pending in the Florida Supreme Court.

If the state fails to bring Dr. Tsavaris to trial, or if the state decides not to seek admission of the subpoenaed evidence, the development of Florida's position on self-incrimination

tainly arguable that the concept underlying Florida's privilege against self-incrimination is broader than the interpretation now being imposed on the fifth amendment by the United States Supreme Court. Case law and statutory law dealing with several aspects of the self-incrimination concept illustrate the broad protection traditionally afforded by Florida's rule against compulsory self-incrimination.

Historically, Florida courts have given broad interpretation to the concept of compulsion within the meaning of the privilege against self-incrimination.[38] As noted earlier, it was a narrow interpretation of the concept of compulsion which allowed the United States Supreme Court to hold that, because Andresen was neither forced to create the documents nor forced to aid the state in the seizure of the testimonial evidence, the later use of such evidence at trial did not compel Andresen to be a witness against himself. This rationale contrasts sharply with the traditional position of the Florida Supreme Court, as illustrated in *Willard.* Referring to the privilege against self-incrimination in the Florida Constitution, the *Willard* court ruled that the defendants had been compelled to be witnesses against themselves because the state's indictment had been grounded "upon evidence extracted from the relators under compulsion, within the meaning of the constitutional provision which protects a person against involuntary self-incrimination."[39] While the Florida Supreme Court in *Willard* held that seizure by warrant supplied the compulsion necessary to invoke the privilege against self-incrimination,[40] a district court in *Dawson* held that production of papers by subpoena to a defendant's employees also supplied the requisite compulsion.[41]

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through compulsory production of private documents will have to await another case. The dicta in *Tsavaris* certainly suggests a less protective role for the privilege against self-incrimination.

38. "The Florida Courts have consistently maintained a liberal view in applying the constitutional guarantees against compulsory self-incrimination . . . ." Mitchell v. State, 227 So. 2d 728, 733 (Fla. 2d Dist. Ct. App. 1969), *rev'd on other grounds,* 245 So. 2d 618 (Fla. 1971).

39. 54 So. 2d at 182.

40. *Id.*

41. 290 So. 2d at 82-83. The *Willard* and *Dawson* decisions are mentioned here for their illustration of Florida's historical position on the self-incrimination concept. The precise extent to which these decisions remain intact after *Tsavaris* is difficult to assess. However, the *Tsavaris* court's limitation of these cases was confined to rejecting those premises which rested on federal constitutional grounds. The parts of these decisions that rested on state constitutional grounds may still reflect valid law.

Tsavaris, of course, flatly rejected the remedy (total immunity) granted in *Willard* and *Dawson.* Such rejection, however, should not disturb the essential finding of those cases that the compelled production of incriminating documentary evidence violates § 9 of the Declaration of Rights of the Florida Constitution.

Other cases reflect the broad protection against self-incrimination afforded by Florida courts. *State v. Kircheis*,[42] which directly conflicts with the *Andresen* rationale, held that an incriminating handwritten note lawfully seized from an arrested suspect's briefcase could not be used as evidence. The court reasoned that the note was testimonial or communicative, and its admission at trial would amount to compelling the suspect to be a witness against himself.[43] Because *Kircheis* in no way relied on any now discredited United States Supreme Court decisions, it represents an accurate reflection of Florida's interpretation of the concept of compulsion within the meaning of Florida's privilege against self-incrimination. That Florida courts have long upheld broad protections in the self-incrimination field is evidenced by the following statement from *Boynton v. State*: "The protection against self-incrimination guaranteed by the Declaration of Rights is applicable to any evidence, *documentary or oral*, that tends to convict one of crime or subject him to penalty or forfeiture; whether the prosecution, penalty or forfeiture involves a civil or criminal act is not material."[44] Thus it appears that, before the somewhat threatening language in *Tsavaris*, Florida courts had consistently espoused a concept of compulsion that afforded much broader protections against the use of documentary evidence than that presently available under federal constitutional standards.[45]

Justice Sundberg seems to have taken the most reasonable course of interpretation of *Willard* and *Dawson* in his special concurring opinion. While he correctly admits that total immunity is probably not the proper remedy in a case of this sort, he would not reject the *Willard* and *Dawson* decisions totally. The *Willard* court misunderstood the federal case on which it rested (Gouled v. United States, 225 U.S. 298 (1921)), and granted immunity rather than simply barring the admission of the improperly obtained evidence. Following *Willard*, the *Dawson* court repeated this mistake. 360 So. 2d at 753-54. Thus, the analysis of compulsion articulated in *Willard* and *Dawson* does not necessarily have to be rejected to harmonize these cases with the denial of total immunity to Dr. Tsavaris.

42. 269 So. 2d 16 (Fla. 3d Dist. Ct. App. 1972).

43. *Id.* at 17. Justice Adkins commented on the rationale of the *Kircheis* case in his dissent in *Tsavaris* and stated, "I assume this principle has now been abandoned, solely because the majority feel bound to construe the state constitution in the same manner as the United States Court construes the federal constitution." 360 So. 2d at 756.

44. 75 So. 2d 211, 213 (Fla. 1954) (emphasis supplied). Dissenting in *Tsavaris*, Justice Adkins cites *Boynton* and several other cases to demonstrate the traditionally strong protections Florida courts have granted in the field of self-incrimination. 360 So. 2d at 755-58. *See, e.g.*, Olson v. State, 287 So. 2d 313 (Fla. 1973); Holmes v. State, 311 So. 2d 780 (Fla. 3d Dist. Ct. App. 1975); Imparato v. Spicola, 238 So. 2d 503 (Fla. 2d Dist. Ct. App. 1970).

45. In addition to Florida's interpretation of compulsion, case law involving prosecutorial comment on an accused's exercise of the privilege against self-incrimination represents an area where Florida courts have traditionally extended broad protections. The position of the United States Supreme Court is that, while prosecutorial comment on an accused's exercise of his fifth amendment right is an error of constitutional dimensions, such error does not require automatic reversal. Chapman v. California, 386 U.S. 18, 22 (1967). The traditional

Florida's immunity statute itself illustrates the breadth of protection under the privilege against self-incrimination in Florida. As the *Tsavaris* opinion noted, "[t]he need for an immunity statute is a corollary to the privilege against self-incrimination, guaranteed by both the Florida and federal constitutions."[46] Since immunity statutes empower prosecutors to compel production or disclosure of incriminating evidence, such statutes can be constitutionally valid only if they entail a grant of immunity against self-incrimination. The scope of the immunity provided under section 914.04, Florida Statutes is full transactional immunity[47] as to any matter about which a person is compelled to give incriminating testimony and use immunity[48] as to any other offenses.[49]

Florida position is illustrated by Bennett v. State, 316 So. 2d 41 (Fla. 1975), in which the Florida Supreme Court held that comment on an accused's right to remain silent was an error "of constitutional dimension and warrants reversal without consideration of the doctrine of harmless error." *Id.* at 44. Recognizing that prosecutorial comment on an accused's invocation of the privilege could chill the exercise of the right and thus narrow the protection afforded by Florida's rule against compulsory self-incrimination, the Florida Supreme Court continued through 1976 to hold that any comment constitutes reversible error. Shannon v. State, 335 So. 2d 5 (Fla. 1976).

Very recently, however, the Florida Supreme Court has retreated from this strong position on prosecutorial comment on an accused's right to remain silent. Clark v. State. 363 So. 2d 331 (Fla. 1978). *Clark* held that in order for a court to entertain an appeal based on prosecutorial comment, there must have been a timely objection and a motion for mistrial. *Id.* As *Bennett* shows, the Florida Supreme Court upheld a more protective role for Florida's privilege against self-incrimination when such a stance was not required by the federal *Chapman* standards. For a thorough discussion of the recent *Clark* case, see a forthcoming comment 7 FLA. ST. U.L. REV. ___ (1979).

46. 360 So. 2d at 749 (footnote omitted).

47. For a thorough discussion of the history of statutory immunity in Florida, see Williams, *The Florida Grand Jury: Abolition or Reform?*, 5 FLA. ST. U.L. REV. 829 (1977). Transactional immunity shields an accused from any prosecution for the crime about which he was forced to testify. *Id.* at 853.

48. A grant of use and derivative use immunity prohibits the later use of a witness' compelled testimony as well as any other evidentiary matters that were discovered through the use of the compelled testimony. *Id.*

49. The case of State *ex rel.* Hough v. Popper, 287 So. 2d 282 (Fla. 1973), explains the extent of the immunity granted under § 914.04, Florida Statutes (1977). In *Hough*, the petitioners were indicted for conspiracy to commit a felony and accepting a bribe with a co-conspirator. Petitioners had previously been compelled to testify in proceedings against the co-conspirator. Responding to petitioners' argument that they were immunized from prosecution for the offenses charged, the Florida Supreme Court stated that because of the grant of transactional immunity, petitioners could not be prosecuted for any matter about which they were forced to testify. In addition, the court stated that the statute entitled petitioners to use immunity. The court explained that the additional grant of use immunity is not superfluous, giving the following illustration. If the state compels a person to testify before a grand jury regarding an armed robbery, and while testifying the witness states that he drove his black Cadillac as the getaway car, and the state later finds that this same car was involved in another, unconnected robbery, the statute provides complete immunity for the robbery the witness was compelled to testify about, and use immunity as to the unconnected robbery. Thus the witness could be prosecuted for the unconnected robbery, but his compelled testi-

In a retreat from the previous federal standard of transactional immunity, the United States Supreme Court recently held in *Zicarelli v. New Jersey State Commission of Investigation*[50] and *Kastigar v. United States*[51] that the federal immunity statute[52] was constitutional because it provided protection coextensive with the fifth amendment. So, since the federal constitution requires only use immunity, Florida's grant of transactional immunity indicates that the protections embodied in Florida's rule against self-incrimination are broad protections which can only be retained by adherence to the higher transactional immunity standard.[53]

In conclusion, if the Florida Supreme Court adopts the fifth amendment rationale of the current United States Supreme Court—and the *Tsavaris* opinion certainly raises that possibility—it will mark a significant departure from the Florida courts' traditional interpretation of the privilege against self-incrimination. The foregoing discussion demonstrates that Florida courts historically have shaped the scope of the privilege against self-incrimination by looking to the ideals behind the privilege rather than to any narrow reading of the constitutional language or to federal decisions. Reiterating the concept expressed in *Murphy v. Waterfront Commission*,[54] Justice England stated in dissent that "[t]he right to resist coerced incrimination reflects our most noble aspirations concerning the proper balance of governmental power and the inviolability of human rights."[55] The privilege against self-incrimination cannot

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mony may not be used in any way, not even to establish ownership of the Cadillac. If the state is to prove its case against the witness in the unconnected robbery, it must do so completely without reference to any of the compelled testimony. 287 So. 2d at 284.

50. 406 U.S. 472 (1972).

51. 406 U.S. 441 (1972).

52. 18 U.S.C. §§ 6002-03 (1970). The federal statute provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply . . . but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in a criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

For an informed discussion of the United States Supreme Court cases defining the federal immunity standard, *see* Note, *Freedom From Self-Incrimination: Transactional Immunity as the Only Fair Standard*, 1971 LAW & THE SOCIAL ORDER 811.

53. In 1977 the Florida Legislature came close to amending the immunity statute to the less protective use and derivative use standard of the federal statute. This measure died when the legislature adjourned with the matter still pending on the calendar. A similar attempt was made in the 1978 legislative session, but the bill died in committee. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 609, 634 n.159 (1978).

54. 378 U.S. 52, 55 (1964).

55. 360 So. 2d at 755 (footnote omitted).

help achieve this proper balance if it is restricted by the narrow semantic construction now being applied by the United States Supreme Court. That the language was not designed to be so narrowly construed is evidenced by the following statement by a preeminent scholar of the privilege:

> By 1776 the principle of the *nemo tenetur* maxim was simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation. The clause itself . . . might have been so imprecisely stated, or misstated, as to raise vital questions of intent, meaning, and purpose. But constitution-makers . . . did not regard themselves as framers of detailed codes. To them the statement of a bare principle was sufficient and they were content to put it spaciously, if somewhat ambiguously, in order to allow for its expansion as the need might arise.[56]

Until *Tsavaris,* the Florida Supreme Court had held that there was no difference between compelled incrimination through oral testimony and compelled incrimination by the forced production of papers. Having been denied immunity, Dr. Tsavaris, should he be brought to trial, will undoubtedly move to suppress the admission into evidence of the items subpoenaed through his secretary. Thus, at some future point, the Florida Supreme Court will almost surely have to decide the self-incrimination issue that it has thus far only considered hypothetically. If Dr. Tsavaris does attempt to suppress the documentary evidence, it will be crucial to determine how severely the *Tsavaris* opinion limited the important *Willard* and *Dawson* decisions. The *Dawson* decision will be particularly important because of its relevant language which dealt with use of a subpoena to force a person to produce another man's records. Thus, while the *Tsavaris* court correctly stated that there is "[v]ery little . . . to be said for a rule under which the doctor's susceptibility to prosecution is made to turn on anything his secretary does or does not do,"[57] it is equally, if not more, important to insure that a man's right to resist compulsory self-incrimination cannot be circumvented by allowing the state to subpoena his records through an employee.

The Florida Supreme Court is under no obligation to follow the trend of the United States Supreme Court in its narrowing of the

56. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 430 (1968).
57. 360 So. 2d at 751.

privilege against self-incrimination.[58] Florida courts have traditionally upheld broad protections in this area to fulfill the guarantee of the Florida Constitution, not merely to satisfy now discarded federal standards. For the Florida courts to uphold a high standard of protection against compulsory self-incrimination does not require a new line of reasoning—it simply requires a reaffirmation of traditional principles. The United States Supreme Court's recent restriction of fifth amendment privileges in the field of personal documents reflects an artificial distinction between thoughts in one's mind and thoughts which one has committed to writing in his private papers. Recognizing the artificiality of this distinction, the Florida Supreme Court should reaffirm the theory of the *Willard* case, which held that a man could not be compelled to be a witness against himself either through oral testimony or through production of his private papers. In the face of declining federal protection, it is imperative that state courts take decisive action to protect the rights of their citizens. The Florida Supreme Court would do well to heed the words of United States Supreme Court Justice William Brennan: "Every believer in our concept of federalism . . . must salute this development in our state courts. Federalism must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions of their freedoms."[59]

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58. As Justice Adkins stated in dissent, "We are not bound to follow a decision of the United States Court in construing the constitution of our State if we more adequately safeguard the individual rights and liberties of our citizens. *See* 20 Am.Jur.2d *Courts* § 225, at 556; State v. Barquet, 262 So. 2d 431 (Fla. 1972)." 360 So. 2d at 756.

59. Brennan, *Address to the New Jersey Bar*, 33 THE GUILD PRAC. 152, 167 (1976).